

STATE OF MAINE
DEPARTMENT OF CONSERVATION
AND FORESTLAND COMMISSION
12 STATE HOUSE STATION
AUGUSTA, MAINE
04330-0001

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The Maine Land Use Regulation Commission, at a meeting of the Commission held November 10, 2004, at Millinocket, Maine, after reviewing the application and supporting documents submitted by Grace Pond Realty Trust for Amendment B to Subdivision Permit SP 3183, staff comments and other related materials on file, pursuant to 12 M.R.S.A. Section 681 et seq. and the Commission's Standards and Rules, finds the following facts:

1. Applicant: Grace Pond Realty Trust
c/o McPherson Timberlands
1414 Odlin Road
Bangor, Me 04401
2. Date of Completed Application: March 15, 2004
3. Location of Proposal: Upper Enchanted Township, Somerset County
4. Zoning: (D-RS) Residential Development Subdistrict (Pursuant to Zoning Petition ZP 437)
(P-WL) Wetland Protection Subdistrict
(P-GP) Great Pond Protection Subdistrict
(P-SL) Shoreline Protection Subdistrict
(M-GN) General Management Subdistrict
5. Affected Waterbody: Grace Pond

Grace Pond is a small native brook trout pond measuring approximately 150 acres in size. It is a shallow pond, with much of its area measuring less than 15 feet deep with a maximum depth of 41 feet. Grace Pond has been identified in the Land Use Regulation Commission Lakes Action Plan as a Resource Class 1B, Management Class 7 pond with outstanding fisheries resources. Accessible and relatively undeveloped, Grace Pond has also been designated a Water Quality Limiting Lake. The Commission has designated Management Class 7 lakes as those lakes not otherwise classified, including many lakes which have multiple outstanding or significant resource values identified in the Wildlands Lake Assessment that should be managed for multiple use, including resource conservation, recreation and timber management.

Proposal

6. The applicant seeks an amendment to Subdivision Permit SP 3183 to allow for the division and sale for development of a lot within a subdivision previously approved by the Commission. The lot proposed for division is identified on the Commission-approved subdivision plat recorded in the Somerset County Registry of Deeds in Book 1822, Page 218 as "15.4 +/- acres not to be developed." The terms and conditions of existing SP 3183 and Amendment A to SP 3183 require that the lot remain undivided, forested and undeveloped. In the original application for SP 3183, the applicant proposed that the lot currently at issue be developed as 2 lots, and identified the lot as proposed Lot #1 and Lot #2.
7. To allow for the availability of suitable soils for development of the two proposed lots, the applicant also proposes that the Commission remove the conditions of Subdivision Permit SP 3183 and Amendment A to SP 3183 that require continued preservation of public access across the 15.4 acre parcel along an existing hiking trail to a popular scenic overlook known as "the Ledges." The applicant indicates that the portion of the trail that crosses the 15.4 acre parcel is currently in disuse, and is not necessary for the public to access to "the Ledges" hiking trail, because access to the trail is available from the existing subdivision road. The applicant also requests that the requirement in Subdivision Permit SP 3183 that the proposed lots use a shared driveway, with a 100 foot wide forested buffer be removed.
8. The applicant submits that the reason the Commission prohibited the development of the above described 15.4-acre lot was to maintain the historic commercial recreational ventures in the area, specifically the Grace Pond Sporting Camps, by maintaining a visual and noise buffer between the proposed subdivision and the sporting camp operation. The applicant further submits that the Grace Pond Sporting Camps were operated as a commercial sporting camp for only one or two seasons following Commission approval of Subdivision Permit SP 3188, which allowed the sporting camp to be turned into individually owned condominium units. According to the applicant, those units have since been used solely as private seasonal camps, eliminating the need for the subject lot to be used as a buffer between the approved subdivision and the sporting camp operation.

Background

9. In 1990, Grace Pond Realty Trust (hereinafter referred to as "GPRT" or "the applicant") submitted a zoning petition and application for a subdivision permit, proposing the division and development of 280 acres as 28 seasonal residential lots, creation of a public boat launch facility on Grace Pond, creation of a lot with no specified boundaries on which the applicant's existing camp was located, establishment of a 250 foot deep conservation easement along the approximately 6,700 feet of the remaining shore frontage on Grace Pond that GPRT owned, and maintenance of approximately 2,140 acres of undeveloped land remaining in Phase III of the applicant's holdings as undeveloped land for use as wildlife habitat and timber management. The 2,140-acre area included the shore frontage and land surrounding McKenney Ponds, and was to be forever protected from further development. The subdivision, as proposed by the applicant, was to include 15 lots with shore frontage on Grace Pond and 13 back lots, ranging from 1.3 acres to 23.8 acres in size.

10. On June 20, 1991, the Commission approved Zoning Petition ZP 437, concluding that, given the size and the existing character of Grace Pond and the physical limitations of the proposed development site, there was a demonstrated need for a limited residential subdivision in this area. However, based upon the evidence in the record the Commission also concluded that 28 lots, in addition to the existing development on the pond, represented development too intensive to maintain the natural character of the area and prevent undue adverse impacts to the existing uses and natural resources.
11. On August 19, 1991, after holding a public hearing on the matter, the Commission issued Subdivision Permit SP 3183 to GPRT allowing the creation of a 20 lot residential subdivision with 12 shorefront lots. The subdivision was also to include the creation of a common water access lot for use by the subdivision lot owners, a lot that would remain undeveloped, and a 2,190-acre retained lot around Grace Pond.
12. In approving Subdivision Permit SP 3183, the Commission modified and revised the applicant's original proposal, making specific findings, conclusions, and conditions of approval related to those modifications and revisions. The Commission's decision included a determination that, in order for a subdivision in the proposed location to meet the statutory criteria for approval, the following conditions were necessary and should be incorporated into the permit approval (*and were incorporated as conditions as follows*):
 - A. Given the size and the existing character of Grace Pond and physical limitations of the proposed development site, the number of subdivision lots for development should be limited to a maximum of 20, and the total number of shorefront lots reduced from 15 to 12 (*Condition #2 of SP 3183 - "The subdivision shall be limited to a maximum of twenty 20 lots, 12 of which have frontage on Grace Pond, and one common access lot as reconfigured and delineated on Map 2, attached."*).
 - B. Proposed Lots #1 and #2 (*these are the same lots as are currently proposed for development by the applicant*) should not be developed in order to prevent development on unsuitable, fragile, poorly drained and very poorly drained, hydric soils, which encompass a significant portion of these lots. Further, proposed Lots #1 and 2 should be maintained in an uncut, forested and undeveloped state to provide a sufficient vegetated visual and noise buffer between existing structures in the Grace Pond Camp Owners Association complex and the proposed subdivision (*Condition #23 of SP 3183 - "The area between the reconfigured lot #1 and the property of Grace Pond Camp Owners Association (proposed lots #1 and 2) shall not be developed, but must be maintained in an uncut, forested and undeveloped state to provide a vegetated visual and noise buffer"*).
 - C. In addition, the Commission found that portions of proposed shoreline Lots #3 and #4 (*currently identified as Lots #1 and #2 on the approved final subdivision plat, and which are located adjacent to the proposed Lots #1 and #2 now identified on the final plat as the 15.4 acre parcel proposed for division*) are inappropriate for development in that the area within approximately 500 feet of the Grace Pond shoreline is fragile, containing hydric soils unsuitable for development. According to the soils map submitted by the applicant with its original subdivision permit application, hydric soils exist over a larger area of the lot currently proposed for division and development than on Lots #3 and #4 of the original application (*Condition #21 of SP 3183 - "With the exception of individual winding*

footpaths to the pond, no development is permitted on those areas identified as hydric soils").

- D. With the exception of allowances for individual winding footpaths to the shoreline, a minimum 200 foot wide uncut vegetative buffer should be maintained along the shoreline of Grace Pond in the area of approved subdivision Lots #1, #2, #3, #4, #5, #6, #7, #8, #9, and #10, to adequately protect fragile hydric soils from development or other disturbances, to provide sufficient buffering from Grace Pond for visual and noise buffering, and for phosphorus export control purposes *(Conditions #6 and #9 required submission of revised Declaration of Protective Covenants for Grace Pond Lot Owners Association and revised deed covenants that incorporated the buffering and other restrictions identified in Finding of Fact #31 of SP 3183).*
 - E. In consideration of concerns of soil suitability for development and sewage disposal purposes, stabilization, erosion control, phosphorus export control, and concerns raised regarding undue adverse impacts to existing uses and resources, the Commission required that a minimum 150 foot vegetated buffer be maintained uncut, except for shared driveway cuts, along the shoreland side of the interior subdivision access road *(Conditions #6 and #9 required submission of revised Declaration of Protective Covenants for Grace Pond Lot Owners Association and revised deed covenants that incorporated the vegetative buffering and other restrictions identified in Finding of Fact #31 of SP 3183).*
 - F. A right-of-way easement should be delineated on the final subdivision plat and incorporated into the subdivision proposal to identify and provide for continued public access to the existing hiking trail which crosses some of the proposed subdivision lots, or a relocated hiking trail, and to the existing scenic vista known as "The Ledges". At a minimum, no clearing or development shall occur within 100 feet of the delineated trail or "The Ledges" with the exception of the approved subdivision access road *(Conditions #6 and #9 required submission of revised Declaration of Protective Covenants for Grace Pond Lot Owners Association and revised deed covenants that incorporated the buffering and other restrictions identified in Finding of Fact #31 of SP 3183. In addition, Condition #14 required "the permittee shall identify and delineate, on the final subdivision plat, the location and width of the existing hiking trail accessing "the Ledges" and "the Ledges" itself, and include provisions in the Lot Owners Association Declaration of Covenants for the preservation and continued accessibility of this trail to the public. In addition, at minimum, no clearing or development shall occur within 100 feet of the delineated trail or "the Ledges" with the exception of the subdivision access road, which may be constructed in accordance with the permit.").*
13. On December 30, 1993, Commission staff issued a Certificate of Compliance for Subdivision Permit SP 3183, allowing for the sale of the approved lots. Issuance of the Certificate included a condition reiterating the Commission's requirement that the 15.4 acre area between the approved reconfigured subdivision lots (which constitutes the area currently proposed by the applicant for division and development) and the property of Grace Pond Camp Owners Association shall not be developed and must be maintained in an uncut, forested and undeveloped state to provide a vegetated visual and noise buffer. At the time of issuance of the Certificate, Commission staff erred in not identifying a deficiency in the permittee's compliance with the terms and conditions of SP 3183; that error being that the permittee's

revised and approved Declaration of Protective Covenants for the Grace Pond Lot Owners Association did not include a specific provision requiring the preservation and continued accessibility of the existing hiking trail to "the Ledges" as depicted on the approved final subdivision plat, as is required by Condition #14 of the permit.

14. On June 30, 1994, Commission staff approved Amendment A to Subdivision Permit SP 3183, acknowledging the transfer of a 6.5-acre portion of the retained lot to the state of Maine, Department of Inland Fisheries and Wildlife, to establish a public access way to Grace Pond (see Development Permit DP 4379).

Review Comments

15. The Maine State Soil Scientist has reviewed the applicant's proposal and comments that the lot is not well suited for development because of the existence of wetland and/or hydric soils over much of the property. He recommends that if the division of the lot is approved, that development should be restricted to the non-hydric soils and restrictions should be placed on how the lake is accessed through any existing wetlands.
16. The Maine Department of Environmental Protection has reviewed the applicant's proposal and expressed limited concerns with the proposed development due to phosphorous loading. The Department recommends due diligence in applying the provisions of the applicant's erosion and sedimentation control plan submitted as part of the initial application, and that additional future development within the Grace Pond watershed may have to be more restrictive in the future, given the small size of the watershed and the major consumption of phosphorous allocation associated with the applicant's current development.
17. The Commission's Planning and Administration Division has made the following comments on the applicant's proposal: "The Commission's Comprehensive Land Use Plan establishes, as a general planning guideline, a limit of one dwelling unit per 10 acres of surface area on lakes or one dwelling unit per 400 feet of frontage -- whichever is most limiting. In this case the limit of 1 dwelling per 10 acres is more limiting (15 units). The lake already had eight dwelling units (seven in the old sporting camp complex) and one at the south end of the lake (which apparently was also associated with the sporting camp at one time). The allowance of 12 additional shoreland dwelling units for a total of 20 units already has placed the lake over the guideline of 15 units.

"The applicant states that only a maximum of 11 dwellings could currently be located within the shoreland area (250 feet) of Grace Pond. The assumption is that only development within 250 feet is lake shore development. The 250 feet is only a measurement of the protection zone around lakes -- no where in the Commission's rules or plan is there the implication that only development within 250 feet of a lake is "lake related". In fact, in the Commission's Lake Management Program (Appendix C of the Comprehensive Land Use Plan) there is a statement that lake concept plans should encompass all lake related development anticipated under the plan or a depth of 500 feet, whichever is more. The implication is that lake-related development includes that development that is at least 500 feet from the lake and possibly a greater distance given the nature of the development or the nature of the setting.

"As stated in the original subdivision permit, in reviewing the phosphorus control plan, the DEP staff recommended that while the plan appears to have accurately addressed phosphorus control there should be no further development within the vicinity of Grace Pond shoreline. As a water quality limiting lake, the Commission may want to be very careful in putting additional stress on this lake. The fact that the sporting camp is no longer functioning as a sporting camp is no reason to increase the number of units already allowed on this lake."

Staff Analysis

18. The applicant's proposed division and development of the lot set aside to remain undeveloped under the Commission's conditions of approval for SP 3183 would increase the number of lots within the subdivision from 20 to 22, and the number of approved shorefront lots within the subdivision from 12 to 14. These additional shorefront lots would bring the total number of existing and approved (or approvable) dwelling units on shorefront lots on Grace Pond to 22.
19. According to the applicant's soils map, submitted with its original application, soils unsuitable for development because of hydric conditions, or not accessible for development due to surrounding hydric soil conditions, exist over a substantial portion of the lots proposed for division, extending from approximately 500 feet inland from the shore of Grace Pond on one side and extending to the approved subdivision road on the other, severely limiting potential building sites on the two proposed lots.
20. According to the approved final subdivision plat for SP 3183, the easement granting public access across the trail to "The Ledges" traverses the lot proposed for division, and is located between 100 and 200 feet from the existing subdivision road, traversing some of the limited soils potentially suitable for development on the lot.
21. Given the restrictions on development and/or the cutting or clearing of vegetation within the areas of identified poorly drained soils, within 150 feet of the lakeside edge of the approved subdivision road, and within 100 feet of the existing trail to "The Ledges", only small and isolated portions of the lots proposed for division and development (Approx. 1.3 acres on proposed Lot #1 and 2.9 acres on proposed Lot #2) would be suitable and available to prospective purchasers for clearing or development. The applicant has not submitted soils test pit information regarding the existence of soils on either of the proposed lots that are both suitable for subsurface wastewater disposal and not located within the limited area precluded from development because of the vegetative buffering requirements imposed by SP 3183. The applicant has also not demonstrated that there is sufficient area on the proposed lots to install a subsurface sewage disposal system, a driveway, and a single family dwelling in appropriate juxtaposition with one another such that they will comply with the vegetative buffering requirements of SP 3183 with respect to the shoreline of Grace Pond, the shoreline side of the subdivision road, or the required 100 foot wide buffer around driveway(s) extending through the forested buffer on the lake side of the subdivision access road (shared or otherwise), and with the required separation distances for dwellings and components of a subsurface sewage disposal system required by the Maine State Plumbing Code.

Review Criteria

22. Pursuant to 12 M.R.S.A. Section 685-B (4), the applicant must demonstrate by substantial evidence that the criteria for approval are satisfied and that the public's health, safety and general welfare will be adequately protected. In approving applications submitted to it pursuant to this section, the commission may impose such reasonable terms and conditions as the Commission deems appropriate. The Commission shall approve no application unless:
- A. Adequate technical and financial provision has been made for complying with the requirements of the state's air and water pollution control and other environmental laws, and those standards and regulations adopted with respect thereto, including without limitation the site location of Development Law, Title 38, section 481 to 488, the Minimum Lot Size Laws, Title 38, chapter 3, subchapter I, article 5-A, for solid waste disposal, for controlling of offensive odors and for the securing and maintenance of sufficient healthful water supplies; and
 - B. Adequate provision has been made for loading, parking and circulation of land, air and water traffic, in, on and from the site, and for assurance that the proposal will not cause congestion or unsafe conditions with respect to existing or proposed transportation arteries or methods; and
 - C. Adequate provision has been made for fitting the proposal harmoniously into the existing natural environment in order to assure there will be no undue adverse effect on existing uses, scenic character, and natural and historic resources in the area likely to be affected by the proposal; and
 - D. Uses of topography, soils and sub-soils meet standards of the current Soil Suitability Guide for Land Use Planning in Maine, or which are adaptable to the proposed use pursuant to said guide and will not cause unreasonable soil erosion or reduction in the capacity of the land to absorb and hold water; and
 - E. The proposal is otherwise in conformance with this chapter and the regulations, standards and plans adopted pursuant thereto.
23. The facts are otherwise as represented in the Application for Amendment B to Subdivision Permit SP 3183, Subdivision Permit SP 3183 and Amendment A to SP 3183 and its application materials, the Application for Zoning Petition ZP 437 and Zoning Petition ZP 437, the public hearing record for these applications and supporting documents, all of which are made part of this record.

Based upon the above findings, the Commission makes the following conclusions:

1. The applicant's proposal to divide and develop the lot previously identified by the Commission as unsuitable for development does not comply with 12 M.R.S.A. Section 685-B (4), in that the applicant has not demonstrated by substantial evidence that the proposed development will not cause an undue adverse affect on the surrounding uses and resources of the area. Specifically,

- A. the Commission has previously concluded that the total number of lots and the number of shorefront lots on Grace Pond should be limited to 20 and 12 respectively, and the applicant has not demonstrated that the proposed increase in the number of shorefront lots, and total number of lots within the watershed of Grace Pond will not cause an undue adverse affect on the existing uses, scenic character, and natural and historic resources of Grace Pond and the surrounding area.
- B. the Commission has previously concluded that the soils existing over much of the lot proposed for development consist of soil types that are unsuitable for development, and that require a prohibition on clearing to ensure protection of the water quality of Grace Pond from the previously approved 20 lot subdivision. The applicant has not demonstrated that the lot proposed for division and development could be developed as two lots on soils determined to be suitable for development pursuant to the current Soil Suitability Guide for Land Use Planning in Maine, or which are adaptable to the proposed use pursuant to said guide and will not cause unreasonable soil erosion or reduction in the capacity of the land to absorb and hold water, or that the required clearing of vegetation associated with any development of these lots would not constitute an undue adverse affect on the lake, given the nature and pattern of existing development on the lake.
- C. the Commission previously concluded that to adequately protect fragile hydric soils from development or other disturbances, and to provide sufficient buffering from Grace Pond for visual and noise buffering and for phosphorus export control purposes, a minimum 200 foot uncut vegetative buffer must be retained along the shoreline of Grace Pond and within 150 of the shoreland side of the approved interior subdivision road, and no clearing or development or shall occur within 100 feet of the delineated trail to "the Ledges". The applicant has not demonstrated that the proposed lots can be developed in a manner that would allow for development and at the same time maintain these undisturbed vegetated buffers or otherwise adequately protect the lake and surrounding uses and resources from undue adverse effects.

Therefore, the Commission DENIES the application of Grace Pond Realty Trust to amend Subdivision Permit SP 3183 to allow for the sale of two additional lots from the 15.4 acre parcel required by SP 3183 to remain undeveloped.

In accordance with 5 M.R.S.A. section 11002 and Maine Rule of Civil Procedure 80C, this decision by the Commission may be appealed to Superior Court within 30 days after receipt of notice of the decision by a party to this proceeding, or within 40 days from the date of the decision by any other aggrieved person. In addition, where this decision has been made without a public hearing, any aggrieved person may request a hearing by filing a request in writing with the Commission within 30 days of the date of the decision.

DONE AND DATED AT MILLINOCKET, MAINE THIS 10th DAY OF NOVEMBER, 2004

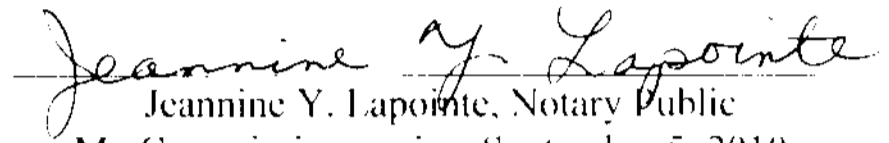
By: Catherine M. Carroll
Catherine M. Carroll, Director

STATE OF MAINE
County of Kennebec, ss.

Date: 11-15-04

Personally appeared the above named Catherine M. Carroll, in her capacity as Director of the Maine Land Use Regulation Commission, and acknowledged the foregoing to be her free act and deed in her said capacity and the free act and deed of the Maine Land Use Regulation Commission.

Before me,


Jeannine Y. Lapointe, Notary Public
My Commission expires September 5, 2010